IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. R.T.S., DOB 8/31/90, Appellant.	)	No. 57202-4-I **DIVISION ONE** UNPUBLISHED OPINION FILED: July 31, 2006

Per Curiam. R.S. challenges the adjudication in juvenile court finding him guilty of two counts of fourth degree assault with sexual motivation. Finding that the evidence was sufficient to support the juvenile court's finding of guilt, that the court's written findings were adequate, and that R.S. was not denied effective assistance of counsel, we affirm.

FACTS

R.S. was charged in juvenile court with three counts of fourth degree assault with sexual motivation. The charges were based on allegations that R.S. improperly fondled three high school classmates. Each of the three alleged assault victims testified at the fact-finding hearing. R.S.'s defense to the charges was that the alleged

touching either did not occur or was consensual. The juvenile court found two of the victims credible and concluded that R.S. was guilty as charged on counts I and III and not guilty on count II.

The court entered the following relevant findings of fact:

Count I

1. On September 29, 2004, the respondent, a male, entered the girls' locker room at Interlake High School in Bellevue, Washington;
2. Also present in the locker room were P.E. (d.o.b. 4-16-90) and J.H. (d.o.b. 6-26-90);
3. Whether the respondent was invited into the locker room is immaterial since he had no authority to enter the girls' locker room;
4. Once inside the locker room, the respondent pushed J.H. out the door;
5. At this point, as P.E. and the respondent were isolated in the locker room, the respondent made sexual statements to P.E.;
6. Without P.E.'s permission, the respondent touched P.E.'s breast;
7. Very shortly after this, P.E. was observed by several witnesses to be upset;

Count 3

1. Sometime during the fall of 2004, the respondent attempted to walk with M.C. (d.o.b. 9-7-90) and her friend K.M. (d.o.b. 3-15-90) as they walked home from school;
2. At some point, the respondent created the ruse that he did not know how to get back to the school;
3. K.M. walked away, leaving the respondent and M.C. alone;
4. While M.C. and the respondent were alone on the sidewalk, the respondent kissed M.C. [and] attempted to grab her breasts without her permission.;
5. M.C.'s assertions go unrebutted;
6. This touching was unwanted by M.C. and upsetting to her.

The court also determined that R.S. had committed each assault for the purpose of sexual gratification. The court imposed a disposition including 6 months of community supervision for each count. R.S.'s motion for arrest of judgment and a new trial was denied on September 27, 2005.

DECISION

R.S. first contends the evidence was insufficient to support either of his convictions. He argues the evidence failed to support the juvenile court's primary findings of fact on both counts and failed to establish the requisite specific intent to commit assault. In order to convict R.S. of fourth degree assault with sexual motivation, the State was required to prove that he assaulted another for the purpose of sexual gratification. See RCW 9A.36.041(1); 13.40.135. Criminal assault includes the unlawful touching of another with criminal intent. See State v. Walden, 67 Wn. App. 891, 893-94, 841 P.2d 81 (1992). A person acts with the requisite intent if he or she "acts with the objective or purpose to accomplish a result which constitutes a crime." RCW 9A.08.010(1)(a).

But R.S.'s challenge to the sufficiency of the evidence fails because it rests on evidence viewed in the light most favorable to the defense. See State v. Townsend 147 Wn.2d 666, 679, 57 P.3d 255 (2002) (when assessing sufficiency of the evidence, appellate court must view evidence in the light most favorable to the State). Moreover, R.S. essentially invites this court to assess the credibility of witnesses differently than the trier of fact. This an appellate court cannot do. See State v. Camarillo, 115 Wn.2d

60, 71, 794 P.2d 850 (1990) ("Credibility determinations are for the trier of fact and cannot be reviewed on appeal").

The State presented evidence in support of Count I establishing that R.S. and J.H. entered the girl's locker room, where P.E. was changing her clothes. R.S. asked P.E. if he could touch her "boob." Although P.E. testified that she did not respond, but merely turned around to shield herself, she told other witnesses shortly after the incident that she had responded "no" to R.S. R.S. then pushed J.H. out of the locker room, reached around P.E., and grabbed her breast. Several witnesses reported that P.E. was very upset when she came out of the locker room. P.E. told one witness that R.S. had also asked her to perform a sexual act. Finally, according to J.H., R.S. bragged about touching P.E.'s breast and said he intended to persuade her to perform a sexual act. Viewed in the light most favorable to the State, the foregoing circumstances support the juvenile court's findings and were sufficient to permit the trier of fact to conclude beyond a reasonable doubt that R.S. intentionally committed an assault for the purpose of sexual gratification by grabbing P.E.'s breast.

As to Count III, the State's evidence established that R.S. followed M.C. and K.M. as they walked home after school one afternoon. R.S. kept trying to talk to M.C. and told her that he did not know how to get back to school. Eventually, K.M. continued on, while M.C. and R.S. walked back in the direction of school. At some point, R.S. asked K.M. to "flash" him, and M.C. said "no." R.S. then attempted to kiss M.C. As M.C. tried to push R.S. away, he put his hand down her shirt. R.S. later approached M.C. and

asked her to make a recording "saying that nothing happened." M.C. refused the request. The juvenile court found M.C.'s account credible and "quite compelling." Viewed in the light most favorable to the State, the evidence was sufficient to support the juvenile court's findings and establish that R.S. intentionally assaulted M.C. for the purpose of sexual gratification.

R.S. also contends the court's written findings are deficient because they do not include an express finding that R.S. "intentionally" assaulted the victims. But it is well established that the term "assault" conveys the notion of an intentional, willful act and "knowing, purposeful conduct." State v. Davis, 119 Wn.2d 657, 663, 835 P.2d 1039 (1992). An assault "includes the element of intent." Davis, 119 Wn.2d at 663 (quoting State v. Hopper, 118 Wn.2d 151, 159, 822 P.2d 775 (1992)); see also State v. Taylor, 140 Wn.2d 229, 243, 996 P.2d 571 (2000) (even under strict standard of construction, charging document alleging "assault" conveys the requirement of an intentional or knowing act). Moreover, the juvenile court found that R.S. had touched both P.E. and M.C. after both girls had expressly rejected his advances. Under the circumstances, the court's finding that R.S. "assaulted" P.E. and M.C. necessarily encompassed the requisite finding of intent.

R.S. next contends the evidence was insufficient to establish that the assaults were part of "a common scheme or plan" as alleged in the information or to support the juvenile court's finding, in conjunction with Count II, that he used a "modus operandi." But R.S. does not allege the offenses were improperly joined or identify some error

under ER 404(b). Rather, he asserts "the State was obligated to prove the crimes as charged." Brief of App., at 26.

Factual allegations in the information that go beyond the necessary elements of the offense are surplusage unless the defendant is prejudiced. See State v. Stritmatter, 102 Wn.2d 516, 524, 688 P.2d 499 (1984). R.S. does not allege any prejudice resulting from the challenged language. Nor is this a case in which the State assumed the burden of proving factual allegations that were not part of the charged offense by including them in jury instructions. See State v. Munson, 120 Wn. App. 103, 108, 83 P.3d 1057 (2004) (in a bench trial, unnecessary allegations in information do not become elements that the State is required to prove). R.S.'s contention is without merit.

R.S. next contends that his constitutional right to a fair trial was violated when the juvenile court admitted evidence implying guilt based on the exercise of his pre-arrest right to remain silent. See State v. Easter, 130 Wn.2d 228, 243, 922 P.2d 1285 (1996). In a related contention, he contends that he was denied effective assistance when defense counsel failed to object to the improper testimony.

R.S. argues that Det. Ellen Inman commented on his silence when she testified about a consensual pre-arrest interview. During the interview, R.S. denied touching P.E., but acknowledged that the two were "playing a game" at some point. According to Det. Inman, when asked to explain what he meant, R.S. "became argumentative at this point and didn't answer the question regarding that." When asked to provide some

details about how he pushed J.H. out of the locker room, R.S. became "argumentative and didn't answer the question."

Viewed in context, the challenged testimony does not amount to an impermissible comment on R.S.'s silence. The crux of Det. Inman's testimony was that R.S. continued to talk as he became angry and "argumentative." Both detectives present at the interview testified that R.S. never indicated that he wanted to end the conversation. "When a defendant does not remain silent and instead talks to police, the state may comment on what he does not say." State v. Clark, 143 Wn.2d 731, 765, 24 P.3d 1006 (2001).

Moreover, to the extent the testimony may have implied a comment on R.S.'s silence, the record fails to demonstrate any resulting prejudice. The witness did not otherwise comment on R.S.'s failure to answer the questions. See Easter, 130 Wn.2d at 242 (officer offered his opinion on guilt by characterizing defendant as a "smart drunk"). Nor has R.S. identified any improper argument by the State or suggested that the judge drew improper inferences from Det. Inman's testimony. See Easter, 130 Wn.2d at 234 (during closing argument deputy prosecutor repeatedly referred to testimony characterizing defendant as a "smart drunk"). In a bench trial, we presume that the judge disregarded any improper inferences in reaching a decision. See State v. Adams, 91 Wn.2d 86, 93, 586 P.2d 1168 (1978).

R.S. next contends that he was denied effective assistance because of defense counsel's deficient cross-examination of a State witness and deficient direct

examination of a defense witness. In order to establish ineffective assistance of counsel, R.S. must demonstrate both (1) that his attorney's representation fell below an objective standard of reasonableness, and (2) resulting prejudice, i.e., a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). There is a strong presumption of effective representation, and the defendant carries the burden of demonstrating there was no legitimate strategic or tactical rationale for the challenged conduct. McFarland, 127 Wn.2d at 336.

R.S. first challenges defense counsel's cross-examination of M.M., a witness who spoke with P.E. shortly after P.E. came out of the locker room. During direct examination, M.M. indicated that P.E. had described the incident in great detail, but was then unable to recall many of the details. R.S. argues that defense counsel's cross-examination was deficient because he helped M.M. recall several prejudicial details about P.E.'s account. R.S. argues that defense counsel's direct examination of Det. Kleinknecht, who was called as a defense witness, was similarly deficient because it produced additional prejudicial details about the alleged touching of P.E.

Although the cross-examination refreshed M.M.'s memory to some extent, defense counsel was able to establish that certain details in her testimony differed from those in her earlier statement and that the details in M.M.'s statement differed from those given by P.E. in her testimony. Defense counsel's questioning of Det. Kleinknecht also brought out discrepancies between P.E.'s account at the fact-finding

hearing and her statements shortly after the incident. Clearly, the purpose of the questioning was to underscore the inconsistencies between P.E.'s current testimony and her earlier statements in an effort to undermine her credibility. Given the nature of the allegations and evidence, this was essentially the only legitimate trial strategy available to defense counsel and did not constitute deficient performance.

Finally, R.S. contends that the juvenile court erred in denying his motion for a new trial. But the motion for a new trial was based on the same arguments that we have considered and rejected in this appeal. Accordingly, R.S. has not established that the juvenile court abused its discretion in denying the motion for a new trial. See State v. Bourgeois, 133 Wn.2d 389, 406, 945 P.2d 1120 (1997).

Affirmed.

For the court:

Appelwick, C.J.

Grosse, J

Coleman, J